Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DENIED: January 18, 2005

GSBCA 14786

JO-JA CONSTRUCTION, LTD.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Mark W. Couch of Couch Dale P.C., Latham, NY, counsel for Appellant.

Robert C. Smith and Kevin J. Rice, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **NEILL**, **HYATT**, and **DeGRAFF.**

NEILL, Board Judge.

In this case, Jo-Ja Construction, Ltd. (Jo-Ja) has appealed the decision of a contracting officer of the General Services Administration (GSA) to terminate for default a contract which GSA had previously awarded to Jo-Ja. The contract was for the renovation of a federal courthouse in Albany, New York (the courthouse project).

By letter dated September 22, 1998, GSA terminated this contract for default. The contracting officer's letter cited multiple grounds for terminating the contract. Jo-Ja appealed this determination. The appeal was docketed at this Board on December 8, 1998.

On October 18, 1999, counsel for the parties filed with the Board a stipulation which read in part as follows:

> (1) The GSA hereby withdraws with prejudice all basis for termination set forth except the ground . . . which is set forth in the Termination Letter as follows:

> FAILURE TO CONTAIN KNOWN LEAD BASED DUST IN ORDER TO ENSURE SAFETY: Jo-Ja has failed to contain lead dust on site and has persisted on sending workers to the job site without proper protection. These actions have continued to expose Jo-Ja's employees and building tenants to a known health hazard of which it has full knowledge (hereinafter "the Lead Issue")[.]

(2) The parties stipulate that all other issues except the Lead Issue, whether identified in the Termination Letter or not, are hereby withdrawn and cannot form the basis or grounds for justifying termination for default of Jo-Ja under the GSA's September 22, 1998 Final Decision.

Following the submission of their stipulation, counsel for the parties filed cross motions for summary relief. We denied both motions on the ground that the central issue underlying the challenged default termination, whether Jo-Ja failed to contain known lead-based dust and utilized improper abatement procedures, remained in dispute. In denying the motions, we pointed out that neither motion was based upon the testimony of a witness who actually had first-hand observation of the abatement techniques used. Jo-Ja Construction, Ltd. v. General Services Administration, GSBCA 14786, 00-2 BCA ¶ 30,964, at 152,793.

Although a hearing was scheduled following denial of the cross motions, it was later canceled owing to Jo-Ja's subsequent filing for bankruptcy. In June 2004, with the approval of the bankruptcy court, the Board convened a hearing. After an exchange of initial and reply briefs, we closed the record for this case in mid-September of 2004. For the reasons set out below, we deny Jo-Ja's appeal.

Findings of Fact

Jo-Ja's Contract

1. Contract no. GS-02P-97-DTC-0207, to renovate the first floor of the James T. Foley Courthouse in Albany, New York, was awarded to Jo-Ja on September 30, 1997. Appeal File, Exhibit 2. Modification 1 of the contract contained a delegation and designation of a contracting officer's representative (COR) for the project. Id., Exhibit 5. The contracting officer's notice to proceed was received by Jo-Ja on October 20, 1997. The notice called for completion of the project within 561 calendar days from this date of receipt. Id., Exhibit 4.

2. The contract provided that the Government would occupy the site and the existing building during the entire period of construction. Appeal File, Exhibit 1, § 01010, ¶ 1.4.A.

3. Jo-Ja's scope of work included "[t]he removal of lead-based paint and plaster substrate from the ceiling and upper walls in the old Post Office work room on the Main Level" of the first floor of the Foley building and "[t]he removal of lead-based paint from scattered locations of the plaster ceilings in the Basement." Appeal File, Exhibit 1, § 01014,

¶ 1.1.A; Transcript at 22-28. The first-floor area was to be converted into two district court courtrooms and associated space. Transcript at 24.

4. The presence of lead-based paint and plaster substrate in this area had been verified by field tests conducted prior to the issuance of the solicitation. The results of the field tests were set out in the solicitation itself on the final page of the same section 01014. Appeal File, Exhibit 1, § 01014, ¶ 1.3.F; Transcript at 26.

5. The contract specifications contained numerous detailed provisions designed to protect the health and safety of construction workers and tenants. For example, section 01506 required the contractor to follow specified interior lead abatement procedures, including work area containment with six mil polyethylene sheeting. Appeal File, Exhibit 1, § 01506. Other contract sections imposed specific requirements relating to worker protection, respiratory protection, safe lead-based paint removal methods, safe disposal, lead dust cleaning, decontamination procedures, and post-abatement testing of the work area. Section 01421 specifically required that wipe samples taken from floor areas following decontamination must be at or below 100 micrograms per square foot. Appeal File, Exhibit 1, §§ 01421, 01555-56, 02065, 02067, 09952; Transcript at 30-41.

6. According to the Environmental Protection Agency, lead can enter the body when people "[b]reathe in lead dust (especially during renovations that disturb painted surfaces)." Respondent's Supplemental Appeal File, Exhibit 1 at 2. Lead is also said to be harmful to adults and can cause "difficulties during pregnancy, other reproductive problems (in both men and women), high blood pressure, digestive problems, nerve disorders, memory and concentration problems," and "muscle and joint pain." Id. at 3.

7. Section 01546 of the contract was entitled "Safety and Health." Paragraph 3.1 of this section provided that, when the contractor is notified by a representative of the contracting officer of any noncompliance with the provisions of the contract and the action to be taken, the contractor should "immediately, if so directed, or within 48 hours after receipt of a notice of violation correct the unsafe or unhealthy condition." This provision further stated that, if the contractor fails to comply promptly, all or any part of the work being performed may be stopped by the contracting officer or the contracting officer's representative with a stop work order which would remain in effect until the unsafe or unhealthy condition was satisfactorily corrected. The contractor was not entitled to any compensation or additional time resulting from this delay. Appeal File, Exhibit 1, § 01546, ¶ 3.1.

8. A similar provision appeared in the Accident Prevention clause which was found in the Federal Acquisition Regulation (FAR), 48 CFR 53.236-13 (1996) (FAR 53.236-13). This FAR clause was part of Jo-Ja's contract. It required the contractor to provide and maintain work environments and procedures which would safeguard the public and government personnel. For construction and demolition, this contractual duty was said to include providing appropriate safety barricades. The clause also provided that, whenever the contracting officer should become aware of any noncompliance with these requirements or any condition which would pose a serious or imminent danger to the health or safety of the public or government personnel, he or she should notify the contractor and request immediate

initiation of corrective action. If the contractor failed or refused to take corrective action promptly, the contracting officer could issue an order stopping all or part of the work until the action was taken and the contractor would be entitled to no equitable adjustment or time extension as a result of the stop-work order. Appeal File, Exhibit 1, Form 3506 at 13.

9. Another provision of the contract, the Non-Compliance With Contract Requirements clause, also authorized the contracting officer to order the contractor to stop any or all work in the event the contractor fails to initiate prompt corrective action when notified in writing by the contracting officer of non-compliance with a contract requirement. Appeal File, Exhibit 1, Form 3506 at 44-45.

10. Jo-Ja's contract also contained the FAR Default clause which is prescribed for use in fixed-price construction contracts. See FAR 52.249-10. Unlike the FAR Default clause prescribed for fixed-price supply and service contracts (FAR 52.249-8), this clause does not require the contracting officer to provide the contractor with notice of default and to accord the contractor an opportunity to cure defects in contract performance prior to termination of the contract. Instead, this version of the Default clause permits the Government to terminate "[i]f the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in [the] contract ." Appeal File, Exhibit 1, Form 3506 at 46.

11. The contract also contained the FAR Disputes clause (FAR 52.233-1) which, among other things, specifically provides that the contractor shall proceed diligently with performance of the contract pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and shall comply with any decision of the contracting officer. Appeal File, Exhibit 1, Form 3506 at 46-47.

Jo-Ja's Initial Containment of the Work Area

12. On March 11, 1998, Jo-Ja submitted to the GSA's architectural and engineering (A/E) consultant for the Foley courthouse project a plan for lead-based paint removal and lead dust containment. This proposed plan called for the erection of polyethylene-enclosed containment areas, specified the protective gear to be used by workers, and spelled out lead decontamination and testing procedures. On that same date, the A/E consultant reviewed the submission and placed his stamp on the document. The stamp bears the date "3/11/98," a signature, and a check in the block which reads "No Exception Taken." Respondent's Supplemental Appeal File, Exhibit 20 at Exhibit A; Transcript at 43-47.

13. The first-floor ceiling of the building had a grid of exposed concrete ceiling beams, approximately 2' x 2' x 2' in size and spaced about twenty feet apart. From approximately March 18 until April 8, 1998, Jo-Ja performed lead paint/plaster removal from the flat surfaces of the first-floor ceiling. Construction photographs show that Jo-Ja used the required containment systems in performing this work. Respondent's Supplemental Appeal File, Exhibit 20 at 1-2 (unnumbered); Transcript at 47, 107-08.

Jo-Ja's Value Engineering Proposal

14. Although Jo-Ja, during the period of March 18 through April 8, removed lead paint/plaster from the flat surfaces of the first-floor ceiling using the required containment systems, it did not remove the paint/plaster from the concrete ceiling beams. The decision not to do so stemmed from a value engineering proposal made to GSA by Jo-Ja's president. In a letter dated April 1, 1998, he proposed leaving the bulk of the plaster and paint on the beams in place and removing the plaster/paint only where new walls would be affixed to the beams. This, he observed, would save both time and money. Respondent's Supplemental Appeal File, Exhibit 4. GSA agreed to the proposal. Id., Exhibits 5, 7.

15. Accordingly, by letter dated April 7, Jo-Ja's president advised GSA that, with the removal of the paint/plaster from the flat surfaces of the first-floor ceiling, Jo-Ja would remove the polyethylene enclosures and proceed to clean the area and test it to ensure the absence of any lead dust. The results of the testing showed the level of any remaining lead dust contamination to be well below the acceptable level of 100 micrograms per square foot. Respondent's Supplemental Appeal File, Exhibits 5-6.

16. By letter dated June 15, 1998, Jo-Ja submitted for approval a lead and plaster removal plan for the concrete ceiling beams. The proposed procedure read as follows:

> Areas of beams to have lead and plaster removal will have plastic duct[-]taped to the surrounding surface completely enclosing the area to be worked on. Lead and plaster will be removed by mechanical means. Removed material will drop into plastic. Once demolition of that location is complete, poly will be removed from surrounding surface, folded over itself to seal in debris and thrown in the dumpster. This operation will be similar to the glove bag method used to remove asbestos from pipes.

Respondent's Supplemental Appeal File, Exhibit 20 at Exhibit D. This submission, like the original containment plan, was reviewed and stamped by the Government's A/E consultant. The stamp bears the date " 6/23/98," is initialed, and has a check in the block which reads "No Exception Taken." Id.

Removal of Plaster and Lead Paint from Ceiling Beams

17. In approximately mid-August, Jo-Ja began the removal of the plaster and lead paint from the first-floor ceiling beams. This removal coincided with the timeframe during which Jo-Ja was erecting the new metal stud walls on the first floor. Respondent's Supplemental Appeal File, Exhibit 19 at 4.

18. GSA had hired a construction services firm to assist with the Foley courthouse project. Among other services, this firm provided construction quality management. An employee of the firm served as the construction quality manager (CQM). He was on site for approximately four hours each day and served as a part-time inspector. Transcript at 105-06.

19. It is the testimony of this CQM that on August 18 and 19, 1998, he visited the project site and observed plaster debris and paint chips on the surface of the first floor and on a man-lift parked in the area. He states that this debris was directly below locations where Jo-Ja had performed plaster/paint demolition. The CQM states that he found no plastic

enclosures in place. Respondent's Supplemental Appeal File, Exhibit 20 at 2 (unnumbered); Transcript at 112-22.

20. Shortly thereafter, by letter dated August 20, 1998, the CQM advised Jo-Ja's president that the plaster/paint demolition on the first-floor ceiling beams was not being done in accordance with the approved demolition/containment procedure and that future demolition must comply with this procedure. By then, the CQM had apparently already informed the COR of his concern, since the same letters also advised Jo-Ja's president that GSA wanted the floor areas to be cleaned and tested to confirm that the lead level was within the acceptable range. Respondent's Supplemental Appeal File, Exhibits 8, 20 at Exhibit E.

21. The contracting officer, by letter dated August 28 to Jo-Ja's president, followed up on the CQM's letter of August 20 to Jo-Ja. She pointed to the CQM's letter as confirmation that the approved procedure for removal of lead and plaster at the ceiling beams was not being followed. Appeal File, Exhibit 208.

22. Shortly thereafter, on September 2, 1998, the CQM wrote once more to the COR. He advised her that on August 31 he had again observed evidence of Jo-Ja's failure to provide proper containment for demolition. He explained that, although the demolition was being done while he was not on site, he nonetheless was able to observe plaster and paint on the first floor. Respondent's Supplemental Appeal File, Exhibits 10, 20 at Exhibit F. The CQM testified that if the procedures for removal of the plaster and lead paint from the ceiling beams had been followed, these paint chips and plaster would have been inside the plastic sheets surrounding the area where spot demolition was being done and would not have even fallen to the floor below, where he observed them to be present. Transcript at 113, 119, 121.

23. The record contains photographs of the plaster and lead paint the CQM observed in the areas beneath the ceiling where spot demolition had occurred. The CQM explained that he took the pictures to show that there was ceiling plaster or paint coming down from where work was being done on the beams above without any containment to keep it from being exposed to the air. Respondent's Trial Exhibits 1, 2; Respondent's Supplemental Appeal File, Exhibit 20 at Exhibits G1-G5; Transcript at 115-23. On cross examination, the CQM readily admitted that he did not have the plaster or paint chips tested for lead but rather assumed it was the lead paint from the ceiling since that was the only painted surface at the time. He explained that he took the pictures inside the area where the new plaster walls had not yet been painted. Transcript at 144-47.

24. Although the CQM testified that he did not test the plaster or paint chips which he found in the areas beneath the beams where spot demolition had occurred, GSA did have lead wipe samples taken of the areas where this debris was found. The CQM's daily log for September 2 states: "GSA take lead wipe samples on 1st floor at locations w[h]ere Jo[-]Ja performed ceiling demo[lition] with-out containment." Respondent's Supplemental Appeal File, Exhibit 2. The results of these samples showed contamination well above the contractually permitted level of 100 micrograms per square foot. Appellant's Motion for Summary Relief, Statement of Uncontested Facts, Exhibit E (Skylab Report dated September 2, 1998). These test results were furnished to Jo-Ja's president who, in a letter to the COR dated September 16, argued that the results did not indicate that the lead contamination was the result of Jo-Ja's construction activity. Appeal File, Exhibit 226.

25. The CQM testified that, during the period of late August to early September, he wanted to observe first-hand the procedures used by Jo-Ja for lead paint removal on the first-floor ceiling beams. To this end, he contacted the president of Jo-Ja by phone to determine when Jo-Ja's workers would actually do the spot demolition so that he could observe and verify they were using the proper procedures. The CQM testified that Jo-Ja's president suggested to him that he contact the on-site supervisor. On doing this, the CQM states that he was told by the supervisor that his instructions were to perform lead paint abatement when the CQM was not there. The CQM further testified that, from this conversation with the on-site supervisor, he understood that the supervisor did not think the spot demolition was being done as required. Transcript at 126-32.

26. The CQM's letter of September 2 to the COR (Finding 22) prompted the contracting officer to dispatch a letter on September 3 to Jo-Ja. This letter complained that Jo-Ja was persisting in removing lead-contaminated plaster from ceiling beams at the first floor without using the approved removal method. This was said to be in violation of the contract and to constitute a health hazard to the contractor's workers and to building residents. The letter directed Jo-Ja "to stop removal work at ceiling beam plaster on the first floor in accordance with Construction Clause 42, 'Accident Prevention' and contain and clean any lead dust generated as a result of improper ceiling plaster removal." The contracting officer's letter concludes:

> No additional work of this nature can occur until the dust generated at the first floor is cleaned and Jo[-]Ja can demonstrate that it has equipment and personnel on site to remove plaster at ceiling beams in accordance with approved methods.

Appeal File, Exhibit 213.

27. By letter dated September 4, the COR wrote to Jo-Ja's president regarding the cessation of work on the first floor of the courthouse owing to Jo-Ja's continued demolition of lead paint and its plaster substrate without any containment in violation of approved procedures. The letter expressly noted that, until contaminated areas on the first floor were cleaned, all work occurring in those areas should comply with contract provisions requiring worker protection and work area containment for lead-based paint. The COR specifically referred to various relevant contract provisions including section 01506, "Work Area Containment - Lead-Based Paint"; section 01555, "Worker Protection - Lead-Based Paint"; and section 01556, "Respiratory Protection - Lead-Based Paint." The COR's letter also officially notified Jo-Ja that if no remedial plan was in place by September 8, the Government would hire another contractor to perform remediation work and charge Jo-Ja for the cleanup. Appeal File, Exhibit 217.

28. On September 9, the contracting officer again wrote Jo-Ja's president. She noted that, to date, no answer had been received to the COR's letter of September 4 which stated that areas on the first floor had been contaminated by Jo-Ja as a result of demolition of first-floor concrete beams without any containment and in violation of approved removal procedures. The letter also noted that, to date, no containment had been erected around the contaminated areas to ensure against cross-contamination and no precautions had been taken

to ensure that workers on site were not harmed. The final paragraph of the contracting officer's letter reads:

> You are hereby directed to contain all contaminated areas immediately. No workers can enter or exit contaminated areas without proper protection as called out by contract specifications. Any cleanup to be performed shall comply with all contract specifications, and a plan for cleanup shall be presented prior to work being accomplished.

Appeal File, Exhibit 220.

29. By letter dated September 10, 1998, Jo-Ja's president responded to GSA's letters concerning lead contamination. He proposed that Jo-Ja complete the remaining removal using its proposed lead removal plan and then proceed with cleanup work and final testing. He noted that there was only a very limited amount of plaster chipping remaining in order to install framing (approximately 40 linear feet). Jo-Ja's president wrote:

> We are not accepting responsibility for any cleanup work and expect to bill any costs for additional cleanup to the Government. As I vigorously pointed out to you at our meeting of September 8, 1998, our tests in all parts of the building show significant amounts of lead contamination, which apparently have been there for years. Also, the basement area has lead paint peeling throughout.

Appeal File, Exhibit 222.

30. By letter dated the following day, September 11, the contracting officer rejected the proposal of Jo-Ja's president. She noted that the proposal did not address protection of demolition workers, workers from other trades currently on site, and building tenants from lead contamination. The letter continued:

> GSA's letter dated September 3, 1998 notified Jo[-]Ja of lead contamination at the first floor and directed it to stop all activities involving demolition of lead-based substrate until existing lead dust at the first floor had been contained and remediated. The September 4 letter stated that no workers should enter contaminated areas without proper protection as called for by the contract. The September 9 letter directed Jo[-]Ja to contain all contaminated areas immediately, and to require proper protection for workers entering contaminated areas. To date, Jo[-]Ja has neglected to contain any lead dust on site, and has persisted in sending workers to the job site without proper protection. Jo[-]Ja's actions continue to expose its employees and building tenants to a known health hazard of which it has full knowledge.
>
> Therefore, in accordance with contract clause 01546, "Safety and Health" and contract clause 96, "Non-compliance with Contract Requirements", you are hereby directed to immediately stop all construction activities on site. Contract work cannot proceed in the work area until lead contamination is remediated. Your plan for remediation must be immediately forwarded to the government

> and the A/E for approval. Remediation work shall not begin until an approved plan is in place.
>
> This stop work order is the result of Jo[-]Ja's non-compliance with contract safety and health provisions and shall not be considered reason for a time extension to the contract. This letter is without prejudice to any rights or remedies which the government may have under the contract or at law, including but not limited to termination of the contract in accordance with our letter dated August 25, 1998.

Appeal File, Exhibit 223.

31. The letter of August 25, 1998, to which the contracting officer referred in her letter of September 11 to Jo-Ja was a letter she wrote to Jo-Ja's president in response to his reply of July 29 to a cure notice dated July 21. The cure notice had advised Jo-Ja of the Government's intent to terminate the contract for default owing to Jo-Ja's failure on several enumerated counts to prosecute the work with a diligence that would ensure timely completion of the project. The contracting officer's letter of August 25 advised Jo-Ja that its answer to this previous cure notice was deemed unsatisfactory and that the Government was still of a mind to terminate the contract for default unless the conditions and defaults identified in the original letter of July 21 were cured within ten days. Appeal File, Exhibits 183, 191, 204. In a letter dated September 3, Jo-Ja's president declined to offer further comment other than to say that the problems noted in the cure notice stemmed from impediments GSA had placed in Jo-Ja's way. The letter affirmed Jo-Ja's intent to continue along the same path it had been following and suggested that, if this was not acceptable to GSA, "then terminate the contract." Jo-Ja's letter closed with the statement: "If you do not terminate the contract, then we expect you to stop harassing us and our bonding company with bogus cure letters." Id., Exhibit 212.

Contractor's Continued Activity Until September 11

32. The CQM's daily logs show that, notwithstanding Jo-Ja's failure to heed the directives of both the COR and the contracting officer regarding worker protection and work area containment for lead-based paint, work did continue until September 11, the date on which the contracting officer issued her total stop work order. The daily logs for September 1 through September 11 show that Jo-Ja regularly had a crew of from six to seven employees engaged in framing walls, doors, and soffits and installing wallboard. For four days during this period, five employees of a subcontractor were working in the area installing duct work. For two days during the same period, one electrician was recorded as working on site, and for one day, two employees of another subcontractor were on site to relocate sprinkler lines and drain water from the system. The CQM's log for September 11 records that the contracting officer's stop work order was issued at 2:30 pm. Respondent's Supplemental Appeal File, Exhibit 2.

Closure of the Contaminated First-Floor Work Area

33. Shortly after the issuance of the contracting officer's total stop work order of September 11, GSA arranged to have the contaminated area on the first floor closed off. At

the hearing on the merits, the COR confirmed this but was unable to recall the specific date on which the area was enclosed. Transcript at 87. Presumably it was sometime between September 11 and September 16 for, by letter dated September 17, Jo-Ja's president wrote the COR as follows:

> This morning I visited the job site and found plastic sheeting covering the entrances to our first floor work area.
>
> I am happy to see you have finally accepted responsibility for the lead contamination in the basement and are attempting to offer our work area protection from the contamination. Again, thank you.

Appeal File, Exhibit 229.

Basement Contamination

34. Even before the controversy regarding lead contamination of the first-floor work area developed between the parties in mid-August 1998, there was a dispute regarding the existence of similar contamination in the basement area of the courthouse. In early August, Jo-Ja was advised that dust from the district court's storeroom in the basement area had been analyzed and found to have extremely high levels of lead. In a letter dated August 14, the contracting officer advised Jo-Ja's president that the majority of the dust in the storeroom "migrated from Jo-Ja's first floor work area, or was generated during Jo-Ja's construction activities." The contracting officer, therefore, directed Jo-Ja to erect new critical barriers, as required under the contract, and to decontaminate the affected area. She likewise warned the contractor to take "any precautionary action necessary to assure that lead concentrations within and adjacent to the work area do not exceed acceptable levels, and to prevent migration of dust outside the work area." Appeal File, Exhibit 195.

35. Shortly thereafter, by letter dated August 17, the COR expressed concern regarding the possibility of lead migration from the storerooms to other areas of the basement. She demanded that Jo-Ja provide an immediate response concerning its proposed plan for lead and dust remediation. She warned that, if this was not done in time to permit workers to be on site by August 19, the Government would have the remediation work done by another contractor at Jo-Ja's expense. Appeal File, Exhibit 198.

36. By letter dated August 20, the COR acknowledged receipt of Jo-Ja's remediation plan but called for some additions to and changes in the plan. Appeal File, Exhibit 200. By letter also dated August 20, the contracting officer passed on to Jo-Ja's president the lab results of lead levels found to exist in five basement rooms in addition to the district court storeroom. She attributed the contamination in all these rooms to the construction activity of Jo-Ja and directed the contractor to erect new barriers as called for in the contract and to decontaminate the affected areas at no cost to the owner. The letter requested Jo-Ja to submit a remediation plan immediately -- no later than August 24 -- since building tenants required ongoing access to these basement areas. Appeal File, Exhibit 201.

37. By letter dated August 24, Jo-Ja's president replied to the contracting officer's letter of August 20. He denied any responsibility for the lead contamination found in the

courthouse basement. He complained that Jo-Ja was being made a convenient scapegoat for a lead problem that had apparently existed for some time. He stated that the contractor should not be held responsible for a GSA lead problem simply because it did lead removal work in the building. He noted that the ceilings in the basement had lead paint on them which had not been kept up by GSA and was currently peeling and flaking. He suggested that the presence of erratic readings could be explained by paint chips which had fallen to the floor and been ground into dust which then was tracked about or became airborne. Appeal File, Exhibit 203.

38. In response to Jo-Ja's reply of August 24 denying any responsibility for the lead contamination found to exist in the basement storerooms, the contracting officer, by letter dated August 28, pointed out to the company president that the contract itself had advised Jo-Ja of the presence of lead paint on the basement ceilings, called for the containment of dust, and prohibited the dispersion of hazardous substances. Consequently, the contracting officer found Jo-Ja responsible for the dispersion of lead dust caused by its construction activities. Specifically, she pointed to the dust generated in the storerooms by Jo-Ja's demolition activities, which included removal of plaster and concrete in the area to prepare for the installation of structural steel. Also, the demolition of the first-floor slab above the boiler room was said to have resulted in the pulverizing of lead paint at the boiler room ceiling and thus further contributed to the lead dust contamination in the area. In closing, the contracting officer established August 31 as the new deadline for the submission of a remediation plan and warned that, if a plan was not submitted by that date, another contractor would be called in to clean the contaminated area. Appeal File, Exhibit 208. By letter of the same date, August 28, Jo-Ja's president replied, reaffirming his belief that Jo-Ja was not to be blamed for the lead contamination in the courthouse basement. Id., Exhibit 211.

39. On September 4, the COR wrote to Jo-Ja's president regarding lead dust contamination in the basement and on the first floor. She noted that Jo-Ja's president had not provided a remedial plan for the basement contamination by August 31, as directed, but instead continued to disclaim any responsibility for the contamination found in the basement area. Appeal File, Exhibit 217. As for the first floor contamination, the COR established a deadline of September 8 for submission of a remediation plan. See Finding 27.

40. By letter dated September 16, Jo-Ja's president advised the COR that his review of the test results of areas in the basement and on the first floor convinced him that the confirmed lead contamination did not indicate that the lead contamination resulted from Jo-Ja's construction activities but rather indicated a prior existence of the contamination. The letter does not offer any explanation of how he arrived at this conclusion. It concludes with an offer to "do the clean-up in these areas" but asks first that GSA issue a request for proposals. Appeal File, Exhibit 226.

Termination of Jo-Ja's Contract

41. By a second letter also dated September 16, Jo-Ja's president formally replied to the contracting officer's letter of September 3. In that letter, the contracting officer had referred to the CQM's allegation that Jo-Ja was persisting in removing lead paint from ceiling beams without following approved procedures. See Finding 26. Jo-Ja's reply denied the allegation as "completely false" and insisted instead that any lead contamination must have

been present prior to Jo-Ja starting work. Although the original letter of September 3 was signed by the contracting officer, this reply from Jo-Ja's president was, for some unknown reason, addressed to the COR, whom he accused of making contentious statements which resulted in a "project striken [sic] with adversarial confrontations." Appeal File, Exhibit 225.

42. The following day, September 17, Jo-Ja's president again wrote the COR. In this letter, he complained that, in all his experience in government contract work, he had never experienced such "blatant disregard and abuse of rules and regulations." The letter then lists a number of "concerns" which Jo-Ja's president apparently believed supported this conclusion. Among other things, he accused the COR of delaying and impeding the progress of the job by ignoring requests to process existing change orders, of delaying the processing of applications for payment, of making irrational decisions not based upon available facts, of harassing and using intimidation tactics in order to gain economic advantage, of orchestrating confrontations in order to discredit the contractor, and of not answering correspondence. In closing, Jo-Ja's president noted that all of these and other listed concerns were contributing to poor morale among the contractor's and the subcontractors' employees. They were said to have lost pride in their work and to be uncertain as to the future of their jobs. The letter concludes:

> Therefore, unless these conditions are cured with 10 days after receipt of this letter, Jo-Ja Construction Ltd. may terminate for default under the terms and conditions of the FAR Clause 52.249-10 Default (Fixed Price Construction) clause of this contract.

Appeal File, Exhibit 228.

43. In a letter dated September 21, 1998, Jo-Ja's president again wrote the COR, this time to complain bitterly of the time taken to review the company's dust removal plan. The letter states that the plan was submitted on September 11. Appeal File, Exhibit 232. A copy of the submitted plan, however, shows that it was not even certified by Jo-Ja's president as being in conformity with contract requirements until September 14. Although the contracting officer directed Jo-Ja to submit its plan for remediation to both the Government and the A/E for approval, we can find evidence of a submission only to the A/E. As with the A/E review of previous containment plans, the A/E consultant reviewed the dust remediation plan and placed its stamp on the document. The stamp bears the date "9/22/98," a signature, and a check in the block which reads "No Exception Taken." Appellant's Trial Exhibit 3.

44. By letter dated September 22, 1998, the contracting officer terminated Jo-Ja's contract for default. As already noted, the original termination letter cited seven grounds for default. Only one, however, remains in dispute. It reads:

> **FAILURE TO CONTAIN KNOWN LEAD BASED DUST IN ORDER TO ENSURE SAFETY:** Jo-Ja has failed to contain lead dust on site and has persisted on sending workers to the job site without proper protection. These actions have continued to expose Jo-Ja's employees and building tenants to a known health hazard of which it has full knowledge.

Appeal File, Exhibit 236 at 8.

45. The contracting officer testified that she ultimately determined to terminate the contract "because of the endangerment of the hazardous material to the workers and the tenants in the building." Transcript at 230. When asked whether at this juncture in time she had confidence that Jo-Ja could or would do the abatement and cleanup, she replied:

> No, I didn't have any confidence as a result of all the correspondence that was going back and forth and it didn't seem like he was trying to alleviate or remedy the problems. It was more of a putting fuel on the fire.

Id. at 231.

46. The COR testified that she drafted the contracting officer's letter of September 11, which preceded the letter terminating Jo-Ja's contract for default. Transcript at 56-57. When asked about the final paragraph of the September 11th letter, which reserved to GSA the right to terminate Jo-Ja's contract, she explained:

> In short, I would say nothing else was working. We told them in this letter, we talk about September 9th, we talk about September 10. We had an inspector on site. We did everything we could to get the contractor to use a method that he himself proposed to use. Not a difficult method, not even an expensive method, to protect his workers. Not only would he not do it, even when asked to stop work, he continued to work. We had other trades on site. Government security workers have to be on site. Nothing we could do short of barring him from the site would stop this man from doing what he wanted to do with this particular issue.

Id. at 62-63.

47. The contracting officer testified that, at the time she issued her decision terminating Jo-Ja's contract, she knew that Jo-Ja had submitted a remediation plan but did not know the plan was actually approved on the same day she issued her decision terminating the contract. Transcript at 232, 239. When asked by opposing counsel whether it would be fair to say that, if she had known that the remediation plan had been approved, she probably would not have issued her decision, she replied "Probably." Id. at 241.

48. The COR testified that she too was aware that Jo-Ja had submitted a remediation plan but was unable to remember whether she knew at the time of the termination that the plan had been approved by the A/E. Transcript at 84-85. When asked by opposing counsel if she deemed it fair to terminate a contractor for default while approval of the proposed remediation plan was pending, the COR replied:

> I would have to say that in this particular instance, the number of promises back and forth had been such that the government no longer had faith that the work that was being promised was going to happen.

Id. at 85. She did, however, agree that, in some cases, such a course of action might not be considered reasonable. Id. at 90.

The Testimony of Jo-Ja's Expert Witness

49. During the hearing in this case, counsel for Jo-Ja called a witness whom the Board recognized as a qualified expert in lead-dust contamination and remediation. Transcript at 291-93. This witness expressed the opinion that the contract specifications dealing with lead contamination were inadequate and, as designed, did not permit a contractor to perform the contract safely. Id. at 295, 327.

50. Jo-Ja's expert was also of the opinion that the major source of the lead dust contamination on the first floor was the hammering of two large six-foot by twenty-foot holes in the cement floor between the first floor and the basement area. He believed that these holes and numerous other apertures of much smaller dimension cut for conduits and pipes would have produced a chimney effect drawing lead dust up from the basement to the first-floor area. He also believed that, because the contract did not require Jo-Ja to clean the basement area where there was considerable contamination, lead dust was tracked from that area into the first-floor area by workers passing back and forth. He also was of the opinion that lead dust generated by construction activity on the second and third floors of the courthouse was tracked into the first-floor area by workmen. Finally, this witness identified the air handling equipment as an additional contributing cause of the lead dust contamination existing in the first-floor work area. Transcript at 298-312, 352, 342.

51. On cross-examination, Jo-Ja's expert witness admitted that he did not know as a fact if Jo-Ja followed approved procedures for spot abatement of lead paint and plaster from the concrete beams on the first-floor ceiling (Finding 16). Transcript at 314, 323. He did, however, readily agree that, if the procedures were not followed, this would have contributed to the contamination but would not have constituted the sole source of the contamination. Id. at 314, 337. The expert admitted that he was unable to say how much or what percentage of the lead dust on the first floor, on which the termination was based, actually came from the first floor. Finally, this expert admitted that he did not know for certain whether the air handlers for the first-floor area were on during the construction period. Id. at 306, 332-33.

52. In testifying at hearing, the CQM agreed that the demolition of the first-floor concrete slab with jack hammers could dislodge peeling paint in the basement and, as concrete fell into the basement area, it could have displaced air with lead dust, forcing it up to the first-floor level. Transcript at 153-55, 158. As to the air handlers being a source of contamination, the CQM testified that the air system serving Jo-Ja's work area on the first floor was turned off during construction and the ductwork remaining in the area was sealed with duct tape around the edges to keep air from getting into the existing duct system. Id. at 136-38.

53. The COR also agreed in her hearing testimony that lead dust, although heavy, nevertheless can travel and be tracked about. Transcript at 77. Nevertheless, it was her testimony that, when the two six-by-twenty-foot holes were made in the cement floor between the first floor and basement, these two large penetrations were covered with polyethylene sheets which were then duct-taped to the floor. Id. at 346-47.

Confirmation of Lead Contamination in the First-Floor Work Area

54. On September 30, 1998, following termination of Jo-Ja's contract, GSA had an independent testing laboratory perform lead wipe tests on the first floor of the courthouse in areas where the CQM believe that demolition of plaster and lead-based paint had been done without proper containment. Respondent's Supplemental Appeal File, Exhibit 20 at 4 (unnumbered). On analysis, the majority of the readings were well above the contractually permitted level of 100 micrograms per square foot. Id. at Exhibit H; Transcript at 135.

Discussion

It is well established that termination of a contract for default is a drastic sanction, a type of forfeiture which should be imposed and sustained only for good grounds and upon solid evidence. De Vito v. United States, 413 F.2d 1147, 1153 (Ct. Cl. 1969); J. D. Hedin Construction Co. v. United States, 408 F.2d 424, 431 (Ct. Cl. 1969); Divecon Services, LP, v. Department of Commerce, GSBCA 15997-COM, et al., 04-2 BCA ¶ 32,656, at 161,633; Wellington House v. General Services Administration, GSBCA 14665, 99-1 BCA ¶ 30,279, at 149,734; General Cutlery v. General Services Administration, GSBCA 13154, 96-1 BCA 27,957, at 139,651 (1995). Because of this, the Government bears the burden of proving that a decision to terminate a contract for default was proper. Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 765 (Fed. Cir. 1987); Environmental Data Consultants, Inc. v. General Services Administration, GSBCA 13244, et al., 96-2 BCA ¶ 28,614, at 142,862; Sierra Tahoe Mfg., Inc. v. General Services Administration, GSBCA 12679, 94-2 BCA ¶ 26,771, at 133,157. The Government contends that termination was proper because of Jo-Ja's "failure to contain known lead based dust in order to ensure safety." Based upon the record before us, we conclude that the Government has met its burden of proving this allegation.

Containment of Lead Dust Generated by Spot Abatement

The evidence relied upon by the Government to support the contention that Jo-Ja failed to comply with the procedures approved for spot abatement is admittedly circumstantial. From the telltale debris observed by the CQM on the floor directly below the ceiling areas where spot abatement had been done, the Government would have us conclude that the approved procedures for containment were not followed. Similarly, the Government would have us reach the same conclusion based upon the fact that tests confirmed that there was lead contamination in the first-floor work area where the CQM observed this debris. See Findings 24, 54.

Were the actual presence of lead contamination in the first-floor area the only support for GSA's contention that Jo-Ja failed to follow the procedures for containment of spot abatement performed on the ceiling beams, we would remain unconvinced of the allegation. Additional evidence persuades us, however, that Jo-Ja's failure was a highly likely source of the contamination.

At hearing, Jo-Ja's expert provided credible testimony regarding the possibility that some lead dust contamination found in the first-floor area may have found its way there from the basement or other construction areas in the building, either in the flow of air or on the

shoes of workers moving from one area to another. Findings 49-50. It is particularly clear that there was a significant problem with lead dust contamination in the courthouse basement. Finding 34-39. Both the CQM and the COR recognized the possibility that some of this dust could have found its way to the first-floor area. Findings 52-53. Nevertheless, we are unable to determine the degree to which this may have occurred.

Undoubtedly, appellant would have us conclude that most if not all of the contamination found in the first-floor area was attributable to the alternative sources identified by its expert rather than to the alleged failure on Jo-Ja's part to follow the approved procedures for spot abatement on the first-floor ceiling beams. There is, however, evidence in the record which shows that the contamination possibly emanating from other sources was not likely to have been as severe as Jo-Ja's president and its expert witness suggest. The testimony of the COR is that one alleged major source of contamination -- the two large perforations of the cement floor between the first-floor and the basement -- was apparently sealed once they were made. Finding 53. Furthermore, Jo-Ja's expert admitted that he did not know whether another suggested source of contamination -- the air handlers for the first-floor area -- was actually operative during the construction period. Finding 51. The testimony of the CQM, however, was that the air system serving the first-floor work area had been turned off and all ductwork leading into the area had been sealed. Finding 52. As to lead dust being tracked into the work area from the basement or elsewhere, while this may have been theoretically possible, there has been no showing that this alleged traffic was in any way significant.

Like us, this expert concluded that it was not possible to say how much or what percentage of the lead dust on the first floor actually came from that floor. To his credit, however, he admitted that he did not know whether the required procedures for spot abatement were actually followed by the contractor but that, if they were not, then this too, in his opinion, would have contributed to the contamination of the first-floor area. Finding 51. In short, to eliminate the presence of lead dust contamination as evidence that these procedures were not followed, Jo-Ja's expert would have had to demonstrate that none of this contamination beyond the tolerable level of 100 micrograms per square foot could have resulted from the contractor's failure to follow the approved procedures -- something which he obviously could not do. We, therefore, consider the presence of lead dust contamination in the first-floor area as ultimately supportive of the Government's contention that Jo-Ja failed to contain lead dust generated by spot abatement on the concrete ceiling beams in violation of its contractual obligation.

Even more convincing than the actual presence of lead dust contamination in the first-floor area, however, is the testimony of the CQM regarding the presence of debris on the floor below those areas of the ceiling where spot abatement had been done. We found this witness and the testimony he provided highly credible and convincing. This individual visited the project site daily. On three separate days he had occasion to notice the presence of debris beneath areas where spot abatement had been done. Findings 18-19, 22.

It is true, of course, that the CQM did not have the plaster or paint chips tested. Nevertheless, the contract itself acknowledged that the paint and plaster substrate of the ceiling in the first-floor areas was lead-based. Finding 3. The unexpected appearance of plaster and paint chips immediately below the ceiling areas where spot abatement had been

done could hardly be ignored. We are not prepared to dismiss the presence of debris in these locations as mere coincidence. Neither are we convinced that what the CQM discovered at these locations was simply the belated detection of debris previously deposited there as a result of work other than spot abatement on the ceiling above. Given the fact that the CQM was on site daily, we are convinced instead that what he reported to the COR and the contracting officer and complained about to Jo-Ja's president were fresh incidents laden with serious significance. The CQM's taking of photographs and sample wipes only confirmed the obvious gravity of the situation. See Findings 20-21, 23-24.

We find the testimony of this witness even more convincing in view of what apparently transpired -- or, more exactly, did not transpire -- once the CQM made his concerns known to Jo-Ja's president regarding compliance with the procedures approved for spot abatement. Although the CQM specifically asked for an opportunity to observe the spot abatement process, the contractor made no effort to accommodate him and may have even gone so far as actively to frustrate him. Finding 25.

We recognize, of course, that it was within the discretion of the contractor to determine when the abatement work should be done. The record, however, shows that, even after the CQM first voiced his concerns, approximately forty linear feet of abatement still remained to be done. Finding 29. Nevertheless, despite the CQM's expressed wish to observe the spot abatement process and the contracting officer's and the COR's immediate concern, we find no indication in the record that Jo-Ja's president ever invited the CQM to observe the spot abatement process or, at a minimum, that he produced for inspection polyethelene sheets containing lead dust generated during the process. See Findings 20-21, 25-28. Instead, we find only a continual general denial of the CQM's allegation. Findings 29, 40-41. We find this puzzling in the extreme, especially in view of the gravity of these matters.

On balance, therefore, we are persuaded by the evidence presented that Jo-Ja did not provide the requisite containment for lead-based dust when undertaking spot abatement on the concrete beams in the first-floor area. We are likewise persuaded that this failure on Jo-Ja's part was at least one contributing cause of the lead contamination which all parties were prepared to admit existed in the first-floor work area.

Other Required Containment

Containment of lead dust generated from spot abatement, however, was not the only containment Jo-Ja was obliged to provide under the contract. Once the presence of lead contamination was confirmed in the first-floor work area, the contracting officer on September 3 directed Jo-Ja in writing "to stop removal work at ceiling beam plaster on the first floor in accordance with Construction Clause 42, 'Accident Prevention' *and contain* and clean any lead dust generated as a result of improper ceiling plaster removal." Finding 26 (emphasis added). In a follow-up letter to Jo-Ja on the following day, September 4, the COR reminded Jo-Ja's president of his obligations under the contract to provide a safe working environment through such means as work area containment when working with lead-based paint. The COR at this time also established September 8 as the deadline for submission of a remediation plan. Findings 5, 8, 27.

In a subsequent letter, dated September 9, the contracting officer complained that, to date, no containment had been erected around the contaminated areas to ensure against cross-contamination and no precautions had been taken to ensure that workers on site were not harmed. She wrote:

> You are hereby directed to contain all contaminated areas immediately. No workers can enter or exit contaminated areas without proper protection as called out by contract specifications. Any cleanup to be performed shall comply with all contract specifications, and a plan for cleanup shall be presented prior to work being accomplished.

Finding 28. In a third letter to the contractor, dated September 11, the contracting officer again complained: "To date, Jo[-]Ja has neglected to contain any lead dust on site, and has persisted in sending workers to the job site without proper protection. Jo[-]Ja's actions continue to expose its employees and building tenants to a known health hazard of which it has full knowledge." Finding 30.

Consistent with his denial that containment procedures had not been followed for spot abatement, Jo-Ja's president contended that the lead contamination found to exist in the first-floor area was not attributable to any failure on the contractor's part to provide appropriate containment. Findings 29, 40-41. Whatever the merit of that position may be, the appropriate course of action under the contract was to erect the containment as directed by the contracting officer and the COR and leave for another day the inevitable dispute over who should pay for the cost of this work. The contracting officer's letter of September 3 cited the contract's Accident Prevention clause, which requires the contractor to take immediate corrective action whenever the contracting officer becomes aware of any condition posing a serious or imminent danger to the health or safety of the public or government personnel. Findings 8, 26. The contracting officer's letter of September 11 cited the contract's section 01546 on Safety and Health and the contract's Non-Compliance with Contract Requirements clause, both of which require the contractor to take immediate or prompt corrective action. Findings 7, 9, 30.

The contract's Disputes clause requires the contractor to proceed diligently with performance and to comply with any decision of the contracting officer pending final resolution of any dispute. Finding 11. This, however, Jo-Ja's president chose not to do. Instead, he ignored the directives of the contracting officer and the COR to provide containment on the ground that this was not a problem of his making. Recognizing the gravity of the situation and the serious safety and health risks the absence of containment posed, GSA issued a total stop work order and itself arranged for the containment it had directed Jo-Ja to erect. Findings 30, 33.

Jo-Ja's failure to comply with containment procedures required for spot abatement undoubtedly contributed to the lead contamination found to exist in the courthouse first-floor work area although, for the reason already stated, we may never know to what degree in view of the possibility that there may have been other contributing causes. This failure, therefore, undoubtedly exposed Jo-Ja's employees and building tenants to a known health hazard of which Jo-Ja had full knowledge. The subsequent recalcitrance of Jo-Ja's president to comply with the contracting officer's and the COR's demands that he comply with contract

requirements and erect containment only further aggravated what was already a serious problem. Records show that throughout the first part of September, employees of the contractor and its subcontractors continued to work in the affected area. Finding 32. There was, consequently, a very real risk of serious harm from a known cause.

We accept as proven, therefore, the Government's contention that Jo-Ja was responsible for a "failure to contain known lead based dust in order to ensure safety."

Did Jo-Ja Cure Its Deficiencies?

We turn now to the question of whether this failure on Jo-Ja's part constituted an acceptable ground for terminating Jo-Ja's contract for default. Appellant would have us look upon the contracting officer's letter of September 11 as a type of cure notice with which Jo-Ja complied well within the ten days normally allowed the contractor to rectify any perceived deficiency in performance. Counsel for appellant points out that within days of the contracting officer's letter of September 11, the contaminated areas were sealed by plastic barriers, the workers were no longer exposed to any contamination, and the remediation plan called for in the letter had been submitted. Accordingly, appellant argues that the drastic sanction of termination for default is not supported by the record. Appellant's Posthearing Reply Brief at 8-10.

We find appellant's argument unconvincing. First and foremost, the argument overlooks the fact that the "curative" action of erecting containment barriers after September 11, was ultimately taken by GSA and not by Jo-Ja. Finding 33. Further, the exposure which concerned the contracting officer and the COR was not anything that might have occurred subsequent to the issuance of the stop work order on September 11, but what had already occurred during the first part of September, when Jo-Ja adamantly refused to comply with the repeated demands on the part of the contracting officer to contain contamination known to exist in the first-floor work area. Finding 32. Granted, a remediation plan was submitted by Jo-Ja (somewhat later, however, than the company's president contended) and was eventually approved by the Government's A/E consultant. Finding 43. This, however, hardly constitutes a "cure," as that term is used in the regulations and case law dealing with terminations for default. The lingering question was whether this contractor, in view of prior statements, actions, and inactions, could be relied upon to follow this plan.

As counsel for respondent points out, the contracting officer's letter of September 11 was not a cure notice at all but a stop work order. Respondent's Posthearing Reply Brief at 3. The stop work order was issued in accordance with the contract's section 01546 on Safety and Health and the contract's Non-Compliance With Contract Requirements clause. See Findings 7, 9, 30. We also agree with GSA's contention that the Default clause in Jo-Ja's contract does not call for the issuance of a cure notice, as required under the FAR for fixed-price supply and service contracts. Finding 10.

In response to government counsel's observations, counsel for Jo-Ja complains that the abrupt termination of Jo-Ja's contract by the contracting officer without notice after calling for a remediation plan in her letter of September 11 "violates not only the contract but also every basic ten[et] of constitutionally protected due process." Appellant's Posthearing Reply Brief at 1. Jo-Ja's argument that the abrupt termination of its contract

without notice after issuance of the contracting officer's letter of September 11 was not to be expected strikes us as disingenuous. In her letter of September 11 dealing with lead dust contamination, the contracting officer had expressly stated that her stop work order was the result of Jo-Ja's non-compliance with contract safety and health provisions and was without prejudice to any rights or remedies which the Government might have under the contract or at law, including termination of the contract in accordance with her letter of August 25. Finding 30. The letter of August 25 had advised Jo-Ja that its reply to previous cure notices was not considered adequate and that termination was still a distinct possibility. Jo-Ja in answer had declined to discuss matters further and had, in effect, challenged GSA to proceed with termination or else cease issuing its "bogus cure letters." Findings 30-31. We view the contracting officer's reference in her letter of September 11 to the possibility of termination, such as already discussed in her previous letter of August 25, as a clear and unmistakable signal that termination for the failure to contain known lead-based contamination remained a distinct possibility.

Furthermore, in his letter of September 17 to the COR, Jo-Ja's president advised that his own employees as well as the employees of Jo-Ja's subcontractors were uncertain as to the future of their jobs. Indeed, in the same letter, Jo-Ja's president advised GSA that he himself was contemplating terminating the contract for default. Finding 42. Given all of these facts, Jo-Ja's subsequent contention that termination was unexpected and required some prior formal notice simply does not ring true.

Did GSA Waive Its Right to Terminate Jo-Ja for Default?

We do not look upon the contracting officer's letter of September 11 as a waiver of the Government's right to terminate Jo-Ja's contract. The necessary elements of an election by the non-defaulting party to waive default under a contract are (1) failure to terminate within a reasonable time after the default, thus indicating a forbearance, and (2) reliance by the contractor on this forbearance and continued performance with the Government's knowledge and implied or express consent. Empire Energy Management Systems, Inc. v. Roche, 362 F.3d 1343, 1354 (Fed. Cir. 2004) (quoting DiVito v. United States, 413 F.2d 1147, 1153-54 (Ct. Cl. 1969)). As already noted, in the instant case we are confronted with two failures on the part of Jo-Ja to contain lead dust in the first-floor work area. The first was with regard to spot abatement of the ceiling beams, while the second was with regard to contamination subsequently found in the area and to which the first failure was at least in part a contributing cause.

In the instant case, we find neither of the requisite elements for waiver of the right to terminate for default. The reasonable course of action when confronted with the first failure on Jo-Ja's part to contain lead dust was, of course, to direct the contractor to cleanse the area. When Jo-Ja refused to comply with the contracting officer's directives and GSA's threats to have the work done by another contractor at Jo-Ja's expense proved unsuccessful, the contracting officer issued a total stop work order on September 11 while reserving to herself the right to terminate the contract. Findings 21, 26-28, 30. On further reflection, she terminated the contract on September 22. Finding 44. We find no unreasonable delay on the part of the contracting officer in ultimately terminating Jo-Ja's contract for failure to comply with contract requirements regarding the containment of lead dust. We likewise find no ground for concluding that, during the brief period of time taken by the contracting officer

to assess the situation and eventually make her termination decision, Jo-Ja could have reasonably believed that termination of its contract was not a distinct possibility.

Was the Project in Danger of Not Being Completed in a Timely Fashion?

What the Default clause in Jo-Ja's contract does require is that the contracting officer be reasonably certain that the contractor "refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in [the] contract." Finding 10. In their testimony, both the contracting officer and the COR described the futility of working with Jo-Ja on the issue of lead dust contamination. Findings 45-46. The contemporaneous documentary record amply supports their testimony. Findings 21, 26-42. Based upon the facts before us, we are convinced that Jo-Ja was not prepared to prosecute its work with a diligence which would have ensured the timely completion of the courthouse project. We agree with the contracting officer that the replies of Jo-Ja's president to GSA communications only served to add more fuel to the fire. Finding 45. Given Jo-Ja's failure to transform its disagreements with the contracting officer into formal disputes pursuant to the contract's Disputes clause, we are convinced that this project would not have been completed in accordance with contract terms within the time specified in the Government's initial notice to proceed. See Finding 1. We, therefore, are satisfied that termination of the contract for the reason stated was proper and in keeping with the terms of the contract's Default clause.

Jo-Ja's Remedial Plan

In his posthearing reply brief, counsel for appellant writes: "[T]he persons responsible for actually drafting the Termination for Default letter admitted that, had they known of the submission of the remediation plan, the letter of Termination for Default would not have issued." Appellant's Posthearing Reply Brief at 11. We are not prepared to attribute to this alleged fact the significance counsel obviously believes that we should give to it.

First, we disagree with the accuracy of counsel's summation of the testimony of the contracting officer and the COR. Both witnesses stated that they were aware of the fact that a remediation plan had been submitted. Findings 47-48. Their lack of certainty was with regard to the *approval*, not the submission, of the plan. Second, their statements are of little if any significance since they were made in response to a hypothetical question posed by opposing counsel during cross-examination. The contracting officer had testified that she was not aware of the fact that Jo-Ja's remediation plan had been approved at the time she terminated the contract. She was then asked whether it was fair to say that *if* she had known of the approval, she probably would not have issued her decision. Her reply was "Probably." Finding 47. Such a question and answer carry with them all the usual problems associated with a hypothetical inquiry -- the principal one being that such an inquiry is, of course, contrary to fact and, thus, often can result in testimony which conflicts with the factual testimony of the same witness. Compare Finding 45 with Finding 47. In this case, the hypothetical question is particularly troublesome because it makes no mention of the very real fact that Jo-Ja had consistently ignored the contracting officer's repeated demands that

the lead dust contamination found on the first floor be contained. We, therefore, attach no significance to the contracting officer's reply to counsel's hypothetical question.

We likewise find nothing noteworthy in the reply of the COR to a similar hypothetical question. Her testimony in response to the hypothetical question does not even appear to be in the least inconsistent with her factual testimony. Although admitting that, in some situations, termination might not be considered reasonable, she nonetheless remained convinced that the instant case was clearly not such a circumstance. See Finding 48.

In the final analysis, however, whatever the opinions of the contracting officer and/or her representative may have been in response to counsel's hypothetical inquiry, they have no ultimate bearing on our evaluation of the merits of this particular case. In cases such as this, the law demands an objective inquiry, not an evaluation of the contracting officer's subjective beliefs. It is the court or tribunal which must consider whether the contracting officer's decision to terminate for failure to make progress was reasonable given the events that occurred before the termination decision was made. Empire Energy Management Systems, 362 F.3d at 1537; McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1016 (Fed. Cir. 2003). In this case the contract, for good reason, placed a heavy emphasis on the need to avoid safety and health risks associated with lead dust contamination. Findings 5-8. Once it was clear that the contractor was unwilling to take the safety precautions called for in the contract, the need for prompt and decisive action was obvious.

Conclusion

For the reasons set out above, it is our conclusion that, in this case, Jo-Ja did fail to contain known lead-based dust to ensure the safety of workers and the building tenants, and that it was not disposed to take the necessary remedial action called for by the contracting officer. Under the circumstances, the contracting officer reasonably concluded that the contract should be terminated in view of the contractor's obvious refusal to prosecute the work in accordance with contract terms and conditions and with a diligence that would ensure completion of the contract at any time -- let alone within the time specified in the contract. We, therefore, affirm the contracting officer's decision to terminate the contract.

Decision

This appeal is **DENIED.**

_____
EDWIN B. NEILL
Board Judge

We concur:

_____
CATHERINE B. HYATT
Board Judge

_____
MARTHA H. DeGRAFF
Board Judge